1.S.B.CIVIL SECOND APPEAL NO.189/2000
Jagdish Prasad and anr.
vs.
Chinma Ram Mantri Charity Trust, Churu and ors.

2.S.B.CIVIL SECOND APPEAL NO.169/2000
LRs. Of Salma.
vs.
Chinma Ram Mantri Charity Trust, Churu and ors.

DATE OF JUDGMENT ::: 20.3.2006

PRESENT

HON'BLE MR. PRAKASH TATIA, J.

Mr. MR Singhvi, for the appellant in appeal no.189/2000
Mr. S Singh, for the appellant in appeal no.169/2000

Mr. S Johari, for the respondents in both appeals.

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Heard learned counsel for the parties.

Both these appeals are decided by this common judgment.

The plaintiff trust filed the suit for cancellation of sale deeds dated 16.4.1979 and 21.6.1979. The suit was filed through trustees. The plaintiffs' case is that the suit property was purchased by the plaintiffs' ancestors from the then State of Bikaner for which a patta was issued in the Samwat Year 1916 and they constructed dharamshala and other related constructions for the beneficial use of

the property including installing some chhatariyas and the land was used as funeral ground for dead bodies of the plaintiffs' family members. They also constructed temples in the property and a private trust deed was executed on 8.11.1965 which was got registered on 10.11.1965. The trustees appointed one Nanag Ram, ancestor of the defendant, as part time pujari and was allowed to live in some of the accommodation of the trust property. After narrating facts in detail about the property, the plaintiff stated that Nanag Ram died on 20.2.1977 and thereafter his family members started creating nuisance. The defendant no.1 – son of Nanag Ram, even executed a sale deed on 16.4.1979 in favour of the defendant no.4 for sale of land measuring 3871 square yards and thereafter, the defendant no.4 executed another sale deed in favour of the defendant no.5 on 21.6.1979. The plaintiff, therefore, filed the suit for cancellation of the above sale deeds and for eviction of the defendants.

The defendants plea was that they are in possession of the suit property since last more than 12 years, therefore, their possession had perfected in title by adverse possession. However, the defendants admitted that Nanag Ram was doing sewa puja in the temple.

The trial court framed the issues which are Whether the suit property belongs to the plaintiff ? and whether on the plea taken by the defendants, the defendants became owners by adverse possession ? The trial court also framed issues with respect to the pleas taken by defendants about non-registration of the trust and consequently, about the

plaintiff's right to file the suit ?

The plaintiffs produced as many as 18 witnesses and produced several documents including the pattas which were issued in favour of the plaintiffs' ancestors along with the documents of various government departments to show that how the property belongs to them and continued so.

The defendants produced two witnesses more in addition to producing defendant no.1 in witness box.

The trial court, after considering the evidence in detail, held that the plaintiffs' ancestors are the owners of the property and the defendants failed to prove their title by adverse possession, therefore, they did not became owner by adverse possession and also held that the sale deeds are void ab-initio. The suit was decreed by the trial court vide judgment and decree dated 28.8.1993.

The defendants preferred separate appeals, one by the defendants no.1 to 3 – descendants of Nang Ram, second by defendant Gafoor and third by defendant Salma. All the appeals were dismissed by common judgment and decree dated 1.4.2000.

In regular first appeal no.36/1994 (37/1993), the original defendants no.1 to 3 submitted an application under Order 41 Rule 27 CPC on 7.1.1994 seeking permission to produce certain documents which are copy of application submitted by the trustees before the Assistant Commissioner Devasthan for registration of the trust, copy of statement of Champa Lal, copy of order passed by Assistant Commissioner Devasthan dated 23.4.1987 and copy of trust deed dated 10.11.1965. This application was dismissed by

the first appellate court vide order dated 1.4.2000.

Hence, these second appeals.

S.B.Civil Second Appeal No.189/2000 :-

Learned counsel for the appellants submitted that the courts below have committed serious error in decreeing the suit of the plaintiffs despite the fact that the plaintiffs did not prove themselves as trustees of the trust and failed to prove their authority to file the suit and also submitted that the trial court passed the decree without giving any description of the property in the judgment and decree, therefore, the decree is not executable.

I have considered the submissions of learned counsel for the parties.

So far as holding the plaintiffs' ancestors as owner is concerned, that finding is based on oral as well as documentary evidence and suffers from no error of fact or of law. The plaintiffs' produced several witnesses as well as documents. The appellants' case for adverse possession is mainly supported by the statements of DW1, DW2 and DW3 only and the defendants in their written statement as well as in evidence admitted that Nanag Ram was pujari in the suit property. In the totality of the facts and circumstances of the case, the findings are findings o facts based on evidence.

So far as the authority of the plaintiff is concerned, it cannot be questioned now in second appeal because the

defendants already admitted that the suit property is known by the name as of the plaintiffs and the defendants also admitted that Nanag Ram was pujari in the suit property.

S.B.Civil Second Appeal No.169/2000 :-

In S.B.Civil Second Appeal No.169/2000, which has been preferred by legal representatives of defendant no.5 Salma, the suit was decreed by the trial court ex-parte against her which has been challenged by Smt. Salma straight away without seeking setting aside of ex-parte decree by moving application under Order 9 Rule 13 CPC. Said appeal was dismissed by the appellate court after holding that the summon upon said Salma was served and she did not appear.

According to learned counsel for the appellant, as per the order-sheet dated 23.2.1980 though the Court recorded that the summons were offerred to the appellant and she refused to accept the summons. One advocate Mr. Moti Singh appeared on behalf of the appellant and sought time for filing the vakalatnama but he did not file the vakalatnama and ultimately, on 28.7.1980, he pleaded no instruction and, therefore, the Court passed the ex-parte order against the defendant no.5. According to learned counsel for the appellant, it is apparent from the report made in the summon itself that the summon was not served upon the appellant as it was not affixed on the outer door of the defendant no.5's house if appellant refused to accept the summons, therefore, service was not proper.

It is also submitted that in identical facts and

circumstances in the case of Smt. Bhani vs. Mahaveer Prasad reported in 1991(1) DNJ (Raj.) 151, where an advocate appeared and did not file vakalatnama and thereafter pleaded no instructions, the ex-parte order was set aside.

It is also submitted that the Hon'ble Apex Court in the case of Milkiat Singh and anr. vs. Joginder Singh and ors. reported in 1998 DNJ (SC) 47 held that when an advocate pleads no instruction, it is the duty of the Court to send the notice to the parties.

I have considered the submissions of learned counsel for the appellant.

There are two procedures to challenge the ex-parte decree – one by filing application under Order 9 Rule 13 CPC and another by preferring the appeal straight away. In the application filed under Order 9 Rule 13 CPC, the trial court can hold enquiry, may be elaborate or summary in nature and thereafter, decide questions of fact. That opportunity is available but when the party against whom ex-parte decree was passed is satisfied and wants to challenge the ex-parte decree on merits or in certain cases on the ground of non-service of summon, he may prefer the appeal but in the appellate court, he is deprived from producing the evidence because the appellate court has appellate jurisdiction and in case, the appellate court finds it proper, it may remit the matter back to the trial court for holding the enquiry on the issues which are necessary for the purpose of deciding whether the trial

court rightly proceeded ex-parte against the appellant or not. The appellate court, in rare cases and for compelling reasons, itself may hold enquiry for the same purpose instead of sending the matter to the trial court.

In this case, the appellant, who has been shown to have been served on 23.2.1980, raised the objection about improper service of summon after about 13 years from the ex-parte order that too by submitting that in fact, the notice was not served on her and it was not affixed on the outer door of her house. The defendant no.5 is purchaser from the defendant no.4 who is also purchaser of the suit property from the defendant no.1. In these facts and circumstances, there is no material available on record for holding that the defendants had dispute amongst themselves so that they would have hidden the suit proceedings from the defendant no.5 for long period of about 13 years as the ex-parte order was passed on 23.2.1980 and the suit was decreed in the year 1993. The appellant wants to rely upon the report made by the process server with a plea that the report made on the summon of offering the summon to the defendant no.5 is wrong. This is a question of fact which should have been and could have been made a subject matter of issue by moving application under Order 9 Rule 13 CPC where question of delay and other issues could have been gone into by the trial court. The defendant no.5 herself chose to prefer appeal on the abstract plea that the report as made alone is sufficient to prove that service is not proper service because the notice was not affixed on the outer door of the house of the defendant no.5.

The defendant no.5 failed to prove before the first appellate court she had no knowledge about pendency of the suit and particularly in view of the fact that there is report of process server upon the summon that the summon was offered to the defendant. The decree passed ex-parte cannot be set said because of the irregularity in the service alone where the party has knowledge about the suit. In these circumstances, in second appeal, this is not available to the appellant to seek determination of question of facts for which there is no evidence.

In view of the above, the judgment relied upon by learned counsel for the appellant in the case of Smt. Bhani (supra) cannot be applied to the facts of the present case.

So far as sending of notice by the Court to the defendant no.5 is concerned, that is procedure evolved by the court in the interest of justice to help those persons who are vigilant and they may not suffer because of no fault of theirs, but in this case, it is not the case of the defendant no.5 that she ever engaged the advocate to appear before the trial court. Therefore, in view of the finding recorded by the first appellate court that the service was proper, the defendant no.5 cannot take a plea that she took step as a prudent person by not engaging advocate to appear on 23.2.1980. In view of the stand taken by the defendant no.5 herself that she did not engage even Advocate to appear, then there was no question of issuing second notice or second summon.

In view of the above, the judgment relied by learned

counsel for the appellant in the case of Milkiat Singh (supra) also has no application.

With this difference, the rest of the facts of this case are as same as given in the appeal no.189/2000.

In view of the above, I do not find any merit in these appeals and the same are hereby dismissed.

(PRAKASH TATIA), J.

S.Phophaliya